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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

Case No. 78-1004

DAVID L. HEILMAN and E-C TAPE SERVICE, INC., a Wisconsin Corporation,
*Petitioners,*

*vs.*

GRIFFIN B. BELL, Attorney General of the United States of America, his agents, servants, employees, attorneys, successors and all those persons in active concert or participation with them,
*Respondents.*

## REPLY BRIEF

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## REPLY BRIEF

### INTRODUCTION

As of February 15, 1972, copyright protection for the first time was extended to sound recordings. Pub. L. 92-140, 85 Stat. 391 (Oct. 15, 1971). At the same time Congress made the unauthorized duplication of sound recordings "fixed" after February 15, 1972, a crime.

Prior to this copyright protection only had been available for the underlying musical compositions. The criminal sanction provided for by Pub. L. 92-140 was made "immediately available to prevent *piracy* of already existing recording of copyrighted musical works *where the pirate does not pay the statutory royalty to the holder of the musical copyright.*" H.R. Rep. No. 92-487, 92nd Cong., 1st Sess. 9 (1971) (emphasis added).

In 1973 this Supreme Court, in reviewing the amended copyright law, reached the conclusion that "composers ... have no control over the recordings themselves." *Goldstein v. California,* 412 U.S. 546, 566 (1973). That same year, in April, the United States Justice Department published a pamphlet entitled "Copyright Protection of Sound Recordings," in which it declared that the unauthorized duplication of sound recordings fixed prior to February 15, 1972, was not unlawful. (App. 117-118)

The Brief for the Respondents in Opposition at 2, filed in this case, contains the statement that in "March 1975 the Attorney General announced that he intended to prosecute such duplicators or 'tape Pirates'." The precise nature and substance of this "announcement," however, are not clear, indeed, are not a matter of record in this case.

In September, 1976, Congress again amended the copyright law, Pub. L. 94-553, 90 Stat. 2541 (Oct. 19, 1976), in order to "make clear" that its statutory royalty and compulsory license provisions were not available in connection with the unauthorized duplication of sound recordings, regardless of when fixed. H.R. Rep. No. 94-1476, 94th Cong., 2nd Sess. 107-108 (1976). On March 31, 1977, David Heilman was charged with having



committed a crime in May, 1975, by duplicating certain sound recordings fixed prior to February 15, 1972 (App. 119), notwithstanding that he had paid or tendered payment of the statutory royalty to the composition copyright owners (App. 117).

A number of reasons now are asserted for denying David Heilman's petition for writ of certiorari in this case. Brief for the Respondents in Opposition at 3-7. These reasons are ill-considered illogical, inconsistent with this Supreme Court's interpretation of the copyright law and without merit.

## ARGUMENT

### The Reasons Advanced For Denial Of A Writ Of Certiorari In This Case Have No Merit.

In the Brief for the Respondents in Opposition at 3-4 it is argued that the meaning of the copyright law can be litigated — presumably along with all other issues there involved, in the criminal prosecution of David Heilman that was commenced while the instant civil action was pending. Besides the fact that that prosecution was commenced notwithstanding representations that it would not be, made by the Attorney General's representative to the District Court below (App. 119), other and unrelated issues necessarily are involved in a criminal case that are not involved here. Such unrelated issues well may serve to confuse the question of statutory construction at issue in this case. Moreover, David Heilman, as a matter of constitutionally secured procedural due process of law, should not be required to endure the vagaries of a criminal prosecution and appeal in order to ask this Court to consider the issues before it now.

It further is argued that no circuits have reached a conclusion contrary to that reached by the Seventh Circuit Court of Appeals in this case. Brief for the Respondents in Opposition at 4. This is not correct:

> "Since a once-recorded composition is available to all third parties 'upon the payment' of a two-cent royalty, manufacture at this point can be 'unauthorized' only in that the third party fails to make the required payments. Thus §101 (e), in treating 'unauthorized manufacture' as infringement, treats nonpayment of the statutory royalty as an act on infringement." *Norbay Music, Inc. v. King Records, Inc.*, 290 F. 2d 617, 620 (2d Cir. 1961).

> "... as far as the copyright law is concerned, even a pirate has the right to record copyrighted musical compositions provided he files notice of intent and pays the royalties." *Miller v. Goody*, 139 F. Supp. 176, 180 fn. 4 (S.D.N.Y. 1956), rev'd on other grounds sub nom. *Shapiro, Bernstein & Co. v. Goody*, 248 F. 2d 260 (2nd Cir. 1957).

More recently, in *American Metropolitan Enterprises of New York, Inc. v. Warner Bros. Records, Inc.*, 389 F. 2d 903 (2nd Cir. 1968), a composition copyright owner sought injunctive relief and damages against a recording company that refused to pay previously agreed upon licensing fees, notwithstanding its use of master recordings containing performances of copyrighted musical compositions by a group, the "Kinks," which included the composer. The Second Circuit Court of Appeals affirmed a lower court decision for the recording company:



> "Since the appellants had 'knowingly acquiesced in the use of the copyrighted work[s],' they no longer have any right to the exclusive use of them. Any person who complies with the compulsory licensing provisions of the Act, may manufacture records containing the thirty-three songs in question without becoming liable as an infringer." *Id.* at 905.

Given the master recordings at issue, the Second Circuit Court of Appeals could not, we repeat, could not have reached this result if it had followed the reasoning of the Seventh Circuit Court of Appeals in the case at hand.

Another argument pressed by the Attorney General is the practical argument that any party wishing to duplicate a composition recorded by, for example, Judy Garland, always can make his own arrangements with her to do so; or can negotiate with the composition copyright owner permission to duplicate a recording previously made by another party. Brief for the Respondents in Opposition at 5-6. Besides the obvious difficulty involved in negotiating with a deceased artist, or any dead person for that matter, and besides the equal difficulty posed by the fact that the composition copyright owners just happen to be owned by the big recording companies (App. 112-113, 118-119), thus rendering successful negotiation of a re-recording agreement with them questionable at best, this Court has said that the composition copyright owners are to have "no control over the recordings themselves." *Goldstein v. California*, 412 U.S. at 566.

Yet another argument advanced by the Attorney General is the argument that the issue in

this case has no continuing importance because since January 1, 1978, the copyright law expressly has prohibited the unauthorized duplication of sound recordings regardless of when fixed. Brief for the Respondents in Opposition at 5. Ignoring the fact that David Heilman is being prosecuted for acts done in 1975, this argument points up the need for this Court to hear this case: David Heilman is the only person in the United States to face criminal prosecution for duplicating sound recordings fixed prior to February 15, 1972. Excerpt of Proceedings [January 30, 1979] at 12, *United States v. Heilman*, Case No. 77-CR-323 (N.D. Ill., filed Mar. 31, 1977) (statement by prosecutor).

It also is argued that the Seventh Circuit Court of Appeals' interpretation poses no ex post facto law enforcement problem, because the copyright law from its inception has prohibited "making copies of musical recordings in violation of the rights of composers." Brief for the Respondents in Opposition at 6. This assertion stands in direct contradiction to this Supreme Court's holding that "composers ... have no control over the recordings themselves." *Goldstein v. California*, 412 U.S. at 566. It also ignores the effect in this case, on David Heilman, of the Attorney General's about face concerning what constituted a criminal duplication of a sound recording prior to the January 1, 1978, clarification of the copyright law.

Finally, the Attorney General argues that there is no ex post facto law problem because in March, 1975, *he* announced an intention to prosecute in "cases of this kind." Brief for the Respondents in Opposition at 7. Besides the fact that this is not of record, it misses the point:



> "It is Congress, and not the prosecution, which establishes and defines offenses." *Sanarbia v. United States*, 98 S.Ct. 2170, 2181 (1978).

It ignores basic principles of our jurisprudence:

> "More fundamentally, the Government's arguments miss the point. The crucial inquiry is not whether Section 22-1115 covers utterances ambivalently, but whether it 'plainly and unmistakably' does so. The governing principle is that penal statutes are to be interpreted with exactitude, a rule deriving sustenance from considerations more ancient than the Nation itself. 'Reasonable precision in the definition of crime has been regarded as a desideratum by free people since the early days of the common law.' *Moreover, the specification of criminal offenses is peculiarly the business, not of courts, but of legislatures.* Criminal statutes are thus 'to be construed strictly, not loosely;' '[s]tatutes will not be read to create crimes ... unless the purpose so to do is plain,' and 'ambiguity' concerning the ambit of criminal statutes 'should be resolved in favor of lenity.'" *Zaimi v. United States*, 476 F. 2d 511, 523-524 (D.C. Cir. 1973) (footnotes omitted) (emphasis added).

It ignores the fact that the ambit of the statutory provision in question here, the precise application and availability of the statutory royalty and compulsory license, was not clarified by Congress until in effect January 1, 1978; and David Heilman is being prosecuted for something he did in May, 1975.

## CONCLUSION

The precise bounds of the statutory provision in question, especially as it relates to a criminal prosecution, requires this Supreme Court's attention. The petition of David Heilman for a writ of certiorari in this case should be granted.

Respectfully submitted,

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